No. 15965

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES BLAIR,

Appellant,

vs.

ROBERT A. HEINZE, Warden of the California State Prison at Folsom,

Appellee.

APPELLEE'S BRIEF

Appeal From the United States District Court for the Northern District of California, Northern Division

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STATEMENT OF THE CASE

The appellant, Charles Blair, presented to the United States District Court for the Northern District of California, Northern Division, two petitions for writ of habeas corpus on or about the sixteenth day of July, 1957. (TR.* 1-40, 41-62.) Leave was asked to file these petitions in forma pauperis. (TR. 5, 37, 41, 60.) On July 31, 1957, the Honorable Sherrill Halbert, Judge of the United States District Court, ordered that the petitioner's motion to file each and/or both

* TR. refers to Clerk's Transcript of Record on Appeal.

of his proposed petitions for writ of habeas corpus in forma pauperis be denied (TR. 67). A motion for a certificate of probable cause presented to the District Court was denied on September 11, 1957 (TR. 80-81). Thereafter the appellant petitioned this court for an order granting a certificate of probable cause and such an order was issued by this court on February 21, 1958 (TR. 81-83).

The first petition filed by the appellant in the District Court alleged that he was confined by the state authorities contrary to the provisions of the United States Constitution and in violation of due process of law for the reason that he was not properly informed of the charge against him in that the information filed in the Superior Court of Los Angeles County was insufficient to charge the commission of a crime. He also contended that he was arrested and searched without reasonable or probable cause and that he was induced to plead guilty by his counsel who promised that he would thereby receive a lesser sentence.

The second petition (combining action) alleged that prison officials had destroyed certain of the petitioner's legal papers and had thus frustrated his efforts to petition the United States Supreme Court for certiorari.

These same points were raised in three applications for writs of habeas corpus presented to the Supreme Court of the State of California on December 31, 1956, March 8, 1957, and March 22, 1957. The first petition attacking the validity of his conviction was denied by

the State Supreme Court without opinion on January 30, 1957 (*In re Blair,* Calif. Sup. Ct. No. 6015).

Thereafter on March 8, 1957, the appellant filed the second petition for writ of habeas corpus in the Supreme Court of the State of California alleging that he had been denied due process of law and equal protection of the laws by the action of the prison officials in confiscating and refusing to return certain legal documents which were in his prison cell. This petition was denied by the State Supreme Court on April 10, 1957 (*In re Blair,* Calif. Sup. Ct. No. 6044).

In opposition to this petition the respondent lodged with the State Supreme Court affidavits of two prison officials showing that none of the petitioner's property (except a mirror) had been retained by the prison officials.

During the pendency of this latter petition in the State Supreme Court the appellant filed a third petition therein on March 22, 1957. This petition again raised the original points which were raised in the petition filed on December 31, 1957, and denied on January 30, 1957. The third petition was denied by the State Supreme Court on April 10, 1957 (*In re Blair,* Calif. Sup. Ct. No. 6052).

The appellant did not petition the United States Supreme Court for a writ of certiorari with respect to any of these three petitions for writ of habeas corpus which were filed in the State Supreme Court.

ARGUMENT

I. The District Court Properly Denied the Appellant's Application to File His Petitions for Writ of Habeas Corpus in Forma Pauperis

The record on appeal in this case shows that the appellant presented to the District Court two petitions for writ of habeas corpus (TR. 1-40 and 41-62). Each of these documents contains a request that the court grant petitioner leave to file in forma pauperis (TR. 5, lines 7-9, and TR. 41, lines 22-26) and an "affidavit of forma pauperis" (TR. 37-38, 59-60).

On July 31, 1957, the Honorable Sherrill Halbert, United States District Judge filed a memorandum and order denying the appellant's motions to file his proposed petitions for a writ of habeas corpus in forma pauperis (TR. 63-67). At the outset we are herein faced with the question whether the District Court properly exercised its discretion in denying to the appellant leave to file and prosecute his petitions in forma pauperis. Title 28, U. S. C. section 1915 provides:

> "(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein without prepayment of fees and costs or security therefor, by a citizen who makes affidavit that he is unable to pay such costs or give such security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress."

This section provides that the court to which application is made "*may* authorize" the commencement of the action in forma pauperis. Thus it is clear from the wording of the section that the court to which application is made is vested with a discretion in determining whether the application for leave to proceed in forma pauperis should be granted. The decisions support the conclusion that the court has such discretion in granting or refusing the request for leave to file in forma pauperis.

Noll v. *United States,* 83 F. Supp. 887;
Williams v. *McCulley,* 131 F. Supp. 162;
Meek v. *City of Sacramento,* 132 F. Supp. 546;
Richardson v. *Hatch,* 134 F. Supp. 110;
Taylor v. *Steele,* 191 F. 2d 852;
Higgins v. *Steele,* 195 F. 2d 366;
Parsell v. *United States,* 218 F. 2d 232.

(a) THE DISTRICT COURT PROPERLY CONSIDERED THE MERITS OF THE PETITIONS IN EXERCISING ITS DISCRETION UNDER TITLE 28 U. S. C. § 1915

The appellant concedes that he "has no right to proceed in forma pauperis," but, he contends the District Court had no authority to consider any matter except the indigency of the appellant in exercising the discretion vested in the court. The cases cited above hold that in considering the question of whether an applicant should be permitted to proceed in forma pauperis the court may base its decision on the merit or lack of merit in the proposed action. The indigency of the applicant is not the sole question to be considered. On the contrary, from a consideration of the

opinions in the cited cases this element would appear to be of secondary importance.

In the case of *Higgins* v. *Steele,* 195 F. 2d 366, which has been cited above, the court stated as follows at page 368:

> "While the District Court correctly dismissed this proceeding, we think it should not have granted Higgins leave to proceed in forma pauperis, should not have put the respondent to the trouble and expense of making a return, should not have allowed Higgins leave to appeal as a poor person, and should have certified that his appeal was not taken in good faith. This proceeding was obviously doomed to futility from its inception and could not lawfully have been entertained.
>
> "Leave to proceed in forma pauperis under 28 U. S. C. A. § 1915 is a privilege, not a right. Prince v. Klune, 80 U. S. App. D. C. 31, 148 F. 2d 18; Dorsey v. Gill, 80 U. S. App. D. C. 9, 148 F. 2d 857, 877. An application for leave to proceed in forma pauperis is addressed to the sound discretion of the court, and an order denying such an application is not a final order from which an appeal will lie, Crockett v. United States, 9 Cir., 136 F. 2d 11; Barkdoll v. United States, 9 Cir., 147 F. 2d 617, 618-619, nor is the order reviewable by mandamus. Fisher v. Cushman, 9 Cir., 99 F. 2d 918. This Court has, however, entertained appeals from such orders, on the assumption that they were appealable, in at least two cases. Gilmore v. United States, 8 Cir., 131 F. 2d 873; and Taylor v. Steele, 8 Cir., 191 F. 2d 852."

The case of *Richardson* v. *Hatch,* 134 F. Supp. 110 also considered this question at length and citing numerous cases on the point stated as follows at page 112:

"Under the above-quoted provisions of the statute, 28 U. S. C. A. § 1915, a district court, in the exercise of judicial discretion, may authorize or refuse to authorize the commencement and prosecution of any action without prepayment of fees and costs or the giving of security therefor. The law is well established that a Federal court should not grant a plaintiff leave to file a complaint and proceed in forma pauperis where it is clear that his proposed action is wholly without merit and will be futile, or is frivolous or malicious. In Gilmore v. United States, 8 Cir., 131 F. 2d 873, 874, the court said:

'A federal court will not grant leave to a poor person to proceed in forma pauperis, under § 832 [now § 915], Title 28, U. S. C. A., if it is clear that the proceeding which he proposes to conduct is without merit and will be futile. . . . [Citing cases].'

"In the case of Prince v. Klune, 80 U. S. App. D. C. 31, 148 F. 2d 18, in considering an application for leave to proceed in forma pauperis the court said:

'This statutory privilege of filing a suit without prepaying costs is conferred only upon a citizen who is "entitled to commence" a suit. In a sense it may be said that one is always entitled to commence any suit, even a suit which asserts no claim upon which relief can be granted.

> But the quoted phrase in its context cannot reasonably be interpreted so broadly. The statute is not intended to confer the privilege of commencing, without prepaying costs, a suit which is plainly without merit.'

"In Johnson v. Hunter, 10 Cir., 144 F. 2d 565, 566, in denying a petition for leave to proceed without payment of costs, the court said:

> 'Attached to the Petition for Leave to Appeal filed herein is a copy of the original Petition for Writ of Habeas Corpus and copies of the orders entered by the District Court. Both orders were based by the District Court solely upon the proposition that the Petition for Writ of Habeas Corpus fails to disclose that petitioner has a meritorious cause and that it presented no issue of fact upon which the petitioner is entitled to a hearing under the rule announced in Waley v. Johnston, 316 U. S. 101, 62 S. Ct. 964, 86 L. Ed. 1302.
>
> 'A District Court is not required to permit a poor person to file a petition without payment of costs unless there is a showing of merit. Whittle v. St. Louis & San Francisco R. Co., C. C., 104 F. 286; Kinney v. Plymouth Rock Squab Co., 236 U. S. 43, 35 S. Ct. 236, 59 L. Ed. 457.' "

In the case of *Meek* v. *City of Sacramento,* 132 F. Supp. 546 the District Court for the Northern District of California, Northern Division, the same court from which this appeal is taken, held that the court was obligated to consider the merits of a petition for writ of habeas corpus prior to granting leave to file the

same in forma pauperis. The court discussed this point in its opinion at page 546:

> "Preliminarily it should be noted that leave to proceed in forma pauperis is a privilege and not a right, Clough v. Hunter, 10 Cir., 191 F. 2d 516; Willis v. Utecht, 8 Cir., 185 F. 2d 210; Johnson v. Hunter, 10 Cir., 144 F. 2d 565; Prince v. Klune, 80 U. S. App. D. C. 31, 148 F. 2d 18; and Dorsey v. Gill, 80 U. S. App. D. C. 9, 148 F. 2d 857. A duty is imposed upon this Court to examine any application for leave to proceed in forma pauperis to determine whether the proposed proceeding has merit, and if it appears that the proceeding is without merit, this Court is bound to deny a motion seeking leave to proceed in forma pauperis, Higgins v. Steele, 8 Cir., 195 F. 2d 366; Huffman v. Smith, 9 Cir., 172 F. 2d 129; Tate v. California, 9 Cir., 187 F. 2d 98; Gilmore v. United States, 8 Cir., 131 F. 2d 873; and Fisher v. Cushman, 9 Cir., 99 F. 2d 918."

II. The Petitioner Has Failed to Exhaust His State Remedies and Has Not Shown Exceptional Circumstances Which Will Excuse Such Failure

The record in this matter shows that the appellant did not exhaust his State remedies and therefore the District Court's denial of his petitions or the right to file them in forma pauperis was required by the provisions of Title 28 U. S. C. § 2254. It is now well settled that exhaustion of State remedies requires that a prisoner in custody pursuant to a judgment of a State court must petition the United States Supreme

Court for a review by certiorari of the State court's decision. (*Ex parte Hawk,* 321 U. S. 114, 64 S. Ct. 448, 88 L. Ed. 572; *Darr* v. *Burford,* 339 U. S. 200, 70 S. Ct. 587, 94 L. Ed. 761.) This requirement must be met "except when there is an absence of an available state corrective process, or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner" (*Darr* v. *Burford,* 339 U. S. at page 218; Title 28 U. S. C. § 2254). The Supreme Court further stated in *Darr.* v. *Burford,* 339 U. S. 200 at page 218:

> "Flexibility is left to take care of the extraordinary situations that demand prompt action."

But, except for those exceptional cases in which the absolute necessity for prompt action requires that the ordinary procedure be bypassed or such process is shown to be wholly ineffectual the Supreme Court has said that the filing of a petition for writ of certiorari in the United States Supreme Court is an indispensable requirement in the exhaustion of state remedies. The reasoning of the Supreme Court is clearly reflected in the following quotation from its decision in *Darr* v. *Burford,* 339 U. S. at page 217, 70 S. Ct. at page 597, 94 L. Ed. at page 774:

> "It is this Court's conviction that orderly federal procedure under our dual system of government demands that the state's highest courts should ordinarily be subject to reversal only by this Court and that a state's system for the administration of justice should be condemned as constitutionally inadequate only by this Court. From this conviction

springs the requirement of prior application to this Court to avoid unseemly interference by federal district courts with state criminal administration."

Turning to the facts in the present case the record shows that three separate petitions for writ of habeas corpus were filed in the Supreme Court of the State of California; that collectively these petitions raised all of the grounds urged in the petitions presented to the United States District Court including the matter of destruction of the petitioner's legal documents by prison officials; and, that in none of these three cases did the appellant petition the United States Supreme Court for a writ of certiorari.

The first of these petitions was filed in the State Supreme Court on December 31, 1956 (*In re Blair,* California Supreme Court No. 6015). The petition alleged that the information upon which appellant was convicted was defectively drawn and did not adequately inform him of the charge against him; and, secondly, that his plea of guilty was the result of improper advice by his counsel. This petition was denied by the State Supreme Court on January 30, 1957. The appellant has made no showing that he prepared or attempted to file a petition for writ of certiorari within the 90 days allowed by law (Title 28 U. S. C. § 2101(c), Supreme Court Rules, Rule 38½), nor did the appellant request any extension of time for the purpose of filing such a petition.

The second petition in the State Supreme Court was filed on March 8, 1957 (*In re Blair,* California

Supreme Court No. 6044). In this petition the appellant alleged that prison officials had taken some of his legal papers and had refused to return them to him. It should be specially noted at this point that this is the principal ground upon which the appellant now argues that the District Court should have entertained the appellant's petitions and issued an order to show cause. It is the basis of the appellant's argument in this appeal that the judgment of the District Court should be reversed with directions to that court to "entertain appellant's petition and grant a hearing on the allegations with respect to the suppression of his legal documents" (Appellant's Brief, page 20).

The respondent in opposition to this petition (in the State Supreme Court) lodged with that court affidavits of two prison officials showing that all articles (except a mirror) which had been taken from the petitioner's cell had been returned to him.

Although the appellant contends that the alleged suppression of his legal documents by prison officials presents a justiciable question relating to the denial of the appellant's right to equal protection of the laws under the Fourteenth Amendment, there is no showing that the appellant sought certiorari in the United States Supreme Court after a denial of his petition in the State Supreme Court. The appellee respectfully submits that as to this particular question the appellant was required to exhaust his state remedies, including the filing of a petition for writ of certiorari. In the absence of such a showing or any indication of

exceptional circumstances as to this point the District Court had no jurisdiction to entertain the petition on this ground. (*Darr* v. *Burford*, 339 U. S. 200, 70 S. Ct. 589, 94 L. Ed. 761.)

With respect to the appellant's petition for writ of habeas corpus relating to the invalidity of his conviction there is nothing to support his contention that he was prevented from petitioning for writ of certiorari by the actions of prison officials. The papers which the appellant states were destroyed by the prison officials were not a part of the record in the case and were not essential to the preparation or filing of such a petition. (Supreme Court Rules, Rule 38, paragraph 2.) The lack of any real need for these particular papers is established by the fact that the appellant filed a third petition for writ of habeas corpus in the State Supreme Court on March 22, 1957 (*In re Blair,* Calif. Supreme Court No. 6052), alleging the same grounds as contained in his petition filed on December 31, 1956.

This latter petition and the petition filed on March 8, 1957, were both denied by the State Supreme Court on April 10, 1957. The appellant does not allege that he was prevented in any way from petitioning for a writ of certiorari in the United States Supreme Court after denial of these last two petitions or that his lost papers which had disappeared prior to the filing of these petitions were needed as an essential part of such petition for writ of certiorari. The very fact that the appellant has been able to file petitions in both the state courts and the United States District

Court, setting forth copies of the information, judgment and commitment indicate conclusively that he is not handicapped or restricted in the preparation of his pleadings.

It is therefore respectfully submitted that the appellant has not exhausted his state remedies and has not shown circumstances bringing his case within any exception to the rule. His petitions were properly denied by the District Court for this reason. (*Ex parte Hawk,* 321 U. S. 114, 64 S. Ct. 448, 88 L. Ed. 572; *Darr* v. *Burford,* 339 U. S. 200, 70 S. Ct. 587, 94 L. Ed. 761.)

III. The Underlying Allegations of the Appellant's Petition on the Merits Do Not State a Justiciable Federal Question

The District Court denied the appellant leave to file his petitions in forma pauperis (TR. 67). In rendering its decision the court found that the petitions were without merit. It is respectfully submitted that the conclusion of the District Court is eminently correct and should be affirmed by this court. The appellant's contentions are three: (1) that his original arrest and the accompanying search were illegal; (2) that he was improperly induced to plead guilty at the suggestion of his counsel and upon the expectation that he would receive a lighter sentence than he did; and (3) that the information to which he pleaded guilty was insufficient to properly inform him of the crime charged against him. We shall consider these points in the order mentioned.

(a) THE LEGALITY OF APPELLANT'S ARREST

It is unnecessary to determine whether or not the appellant's arrest and search were legal or not. It is obvious that the validity of the arrest and search have no bearing on the question of the appellant's conviction on his plea of guilty. There was no introduction of evidence illegally obtained. The judgment under which the appellant is incarcerated rests upon the proceedings in the Superior Court not upon facts surrounding his arrest. It is well settled that irregularities in the arrest of a defendant or other preliminary proceedings are waived by the failure of the defendant to object at the time and do not affect the validity of a subsequent judgment on the merits. (*In re Berry,* 43 Cal. 2d 838, 279 P. 2d 18; *In re Razutis,* 35 Cal. 2d 532, 219 P. 2d 15 (Cert. Den. 340 U. S. 842); *In re Tedford*, 31 Cal. 2d 693, 192 P. 2d 3 (Cert. Den. 335 U. S. 847); *In re Basham*, 24 Cal. App. 2d 285, 74 P. 2d 781.) Even if it be assumed that there was some irregularity in the matter of the appellant's arrest, such infirmities do not give rise to a constitutional question relating to the validity of appellant's conviction. (*Weeks* v. *United States,* 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652; *Williams* v. *United States,* 215 F. 2d 695; *Breithaupt* v. *Abram,* 352 U. S. 432, 77 S. Ct. 408, 1 L. Ed. 2d 448; *United States ex rel Lawson* v. *Skeen,* 145 F. Supp. 776.)

(b) THE APPELLANT'S PLEA OF GUILTY

The appellant alleges in his petition that he was improperly induced to plead guilty. He expresses disappointment with the fact that his codefendants were given county jail sentences while he was sentenced to the state prison. The propriety or impropriety of a plea of guilty which has been entered upon advice of counsel does not present a constitutional question which is reviewable in a federal court on habeas corpus. This is settled beyond dispute. (See *Wall* v. *Hudspeth,* 108 F. 2d 865 and authorities therein cited.) The allegations of the appellant's petitions do not show the existence of such outrageous circumstances or the action of state officials as would warrant an exception to this general rule (*Darr* v. *Burford,* 339 U. S. 200, 70 S. Ct. 587, 94 L. Ed. 761; *Lyle* v. *Eidson*, 182 F. 2d 344 (Cert. Den. 340 U. S. 837)).

(c) THE SUFFICIENCY OF THE ALLEGATIONS OF THE INFORMATION

The appellant asserts that the information was defective in that the allegations thereof did not adequately inform him of the crime with which he was charged. A copy of the information is set forth in the petition presented to the District Court (TR. 13-14). The information charges the appellant with the crime of forgery of fictitious name in violation of Section 470 of the Penal Code of the State of California, in that on a certain date the appellant, with intent to

cheat and defraud certain named persons, did make, alter, pass, utter and publish a certain fictitious check.

The alleged insufficiency of the information is said to consist in the fact that the fictitious name is not set forth in the information and that the facts charge a violation of Penal Code Section 476 rather than Section 470. Section 470 of the California Penal Code provides that:

> "Every person who, with intent to defraud, signs the name of another person, *or of a fictitious person,* knowing that he has no authority so to do, to, or falsely makes, alters, forges, or counterfeits, any * * * check, draft, bill of exchange, * * * for the payment of money or property, * * * is guilty of forgery." (emphasis added)

Section 476 of the Penal Code defines the offense of making or passing a fictitious check, bill, or note for the payment of money of some bank, corporation or individual when in fact no such bank, corporation or individual exists. In the present case the appellant was charged with a violation of Section 470, forgery of a fictitious name. The check in question was therefore a fictitious one. The information clearly charged a violation of Section 470 and it was sufficient to inform the appellant of the charges against him.

The authorities in this State clearly hold that the forgery of a fictitious name may be prosecuted either under Section 470 or 476 of the Penal Code. (See *People* v. *Bernard,* 21 Cal. App. 56, 130 P. 1063; *People* v. *Lucas,* 67 Cal. App. 452, 227 P. 709; *People*

v. *Cohen,* 113 Cal. App. 260, 298 P. 114.) In *People* v. *Lucas,* above cited, the court discussed this point as follows on page 454:

"Section 470 of the Penal Code was amended in 1905, and apparently for the purpose of making it sufficiently broad to cover the making of a fictitious check, as well as forged checks.

"In *People* v. *Bernard,* 21 Cal. App. 56 [130 Pac. 1063], the defendant was prosecuted for the identical offense as here charged, and the proof was substantially as here produced, and upon appeal a like objection was made. That case is authority for the right to prosecute under either section 470 or 476 of the Penal Code. A portion of that decision is as follows: 'Appellant claims that the court erred, for the reason, as he claims, that a prosecution for making a fictitious check should be under section 476 of the Penal Code, and not under section 470, under which this case was prosecuted, citing in support thereof *People* v. *Elliott,* 90 Cal. 486 [27 Pac. 433], and *People* v. *Eppinger,* 105 Cal. 36 [38 Pac. 538]. Since those cases were decided, however, section 470 has been amended to avoid the rule laid down in those cases and so as to cover the case made by the proof in this action, and covered by the instruction given by the court and now challenged by appellant. (Stats. 1905, p. 673.)'

"Prosecutions were being had before the 1905 amendment, and many cases failed solely because upon an information charging forgery a defendant would cause it to appear that the check was a fictitious check, and thus thwart the prosecution. In 12 Cal. Jur., section 7, it is laid down that a

prosecution for forgery, where it is accomplished by passing a fictitious check, may be had under either sections 470 or 476 of the Penal Code, since said amendment of 1905."

Similarly, in the case of *People* v. *Cohen,* 113 Cal. App. 260, 298 P. 114, the court stated as follows on page 262:

"His first contention is that an information based upon section 470 of the Penal Code is insufficient to support a conviction where it appears that the drawer of the forged instrument is a fictitious character. Since the amendment of 1905 to section 470, this contention is no longer tenable. (*People* v. *Gayle,* (1927) 202 Cal. 159 [259 Pac. 750], citing *People* v. *Whitaker,* (1924) 68 Cal. App. 7 [228 Pac. 376], *People* v. *Lucas,* (1924) 67 Cal. App. 452 [227 Pac. 709], and *People* v. *Jones,* (1909) 12 Cal. App. 129 [106 Pac. 724].) The information in *People* v. *Lucas* was in substance that found in each of the four counts in the instant case. (See, also, *People* v. *Winthrop,* (1928) 88 Cal. App. 591 [264 Pac. 263], *People* v. *Carmona,* (1926) 80 Cal. App. 159 [251 Pac. 315], and *People* v. *Bernard,* (1913) 21 Cal. App. 56 [130 Pac. 1063].)"

It therefore appears that there is no merit in the appellant's contention that the facts alleged in the information charged a violation of Section 476 and not a violation of Section 470.

The facts in this case are not analogous to those in the case relied upon by the appellant, namely *Cole* v. *Arkansas,* 333 U. S. 196, 68 S. Ct. 514, 92 L. Ed. 644.

In the *Cole* case the petitioners were tried and convicted of a violation of Section 2 of a particular state statute. Their conviction was affirmed by the State Supreme Court on the specific ground that they had violated Section 1 of the act which described an entirely different offense. The United States Supreme Court granted certiorari and reversed. In setting forth the facts the United States Supreme Court stated as follows:

> "We therefore have this situation. The petitioners read the information as charging them with an offense under section 2 of the act, the language of which the information had used. The trial judge construed the information as charging an offense under section 2. He instructed the jury to that effect. He charged the jury that petitioners were on trial for the offense of promoting an unlawful assemblage, not for the offense 'of using force and violence.' Without completely ignoring the judge's charge, the jury could not have convicted petitioners for having committed the separate, distinct, and substantially different offense defined in section 1. Yet the State Supreme Court refused to consider the validity of the convictions under section 2, for violation of which petitioners were tried and convicted. It affirmed their convictions as though they had been tried for violating section 1, an offense for which they were neither tried nor convicted."

In holding that the petitioners had been denied due process of law the Supreme Court held that:

> "To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court."

Although the information in the present case could have been more explicit in setting forth the facts it was, nevertheless, sufficient to inform the defendant of the charge against him and he was not, as in the *Cole* case, convicted on a separate and distinct offense from that charged in the information. Any slight imperfection in the drafting of the information did not deprive the appellant of his constitutional rights, especially where he was represented by counsel and he has not shown that he was deprived of any defense by reason of any imperfection in the information (*Ex parte Hull*, 312 U. S. 546, 61 S. Ct. 640, 85 L. Ed. 1034).

CONCLUSION

It is respectfully submitted that the petitions presented to the District Court in this matter do not raise any constitutional question which the District Court was required to pass upon. The appellant having failed to exhaust his state remedies and his underlying petitions being obviously without merit the District Court properly denied his application to file his

petitions in forma pauperis. It therefore appears that the present appeal is without merit and should be dismissed.

Respectfully submitted,

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